

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

FILED  
U.S. Bankruptcy Court  
WDNC, Charlotte, NC

APR 25 2001

IN RE:

CHARLES R. HICKS  
BARBARA H. HICKS,

Debtors.

) Case No. 01-30126 Geraldine Treutelaar Crockett,  
) Chapter 7 Clerk  
) /sh

ORDER

JUDGMENT ENTERED ON APR 25 2001

This matter is before the Court on the Debtors' motion for issuance of a Certificate of Discharge. A hearing was conducted on April 12, 2001.

In their Motion, the Debtors pray for an order, effectively, cancelling two (2) judgment liens of record from the Mecklenburg County, North Carolina, public registry. These are (1) a judgment of Providian National versus Charles R. Hicks, dated December 30, 1999, filed in Book 547 Pg. 273, for \$7,458.39, plus interest and costs and (2) a judgment of Washington Mutual against Barbara Hicks, dated December 6, 2000 and filed in Book 558, Pg. 61, for \$1,632.50, plus interest and costs.

As of the bankruptcy date, the Debtors owned real property in Charlotte, North Carolina having a value of \$98,000. In addition, prior to the two mortgages, there is a first mortgage owed on the property having a balance of \$69,056 and a second mortgage of \$36,351. Therefore, based upon the undisputed evidence (the judgment creditors did not respond to this motion or appear at this hearing), it would appear that there is no equity to support either judgment.

However, having considered the facts, the Court believes that the Motion must be denied, on procedural grounds, but without prejudice to refiling.

Following the U. S. Supreme Court's decision in Dewsnup v. Timm, 502 U.S. 410, 112, S.Ct. 773 (1992), this Court and others assumed that a Chapter 7 Debtor could not strip down an under secured creditor's lien on real property. However, Dewsnup was a limited opinion, and other Courts subsequent to that time have interpreted it such that it does not apply to wholly unsecured liens. See, e.g. In re Smith, Case No. 98-00093A (Bankr. W.D.Va., May 21, 1999); In re Smith, Ca, 99-53-3 (W.D.Va., Mar. 14, 2000). Smith has been affirmed in a recent decision by the Fourth Circuit Court of Appeals. In re Smith, 243 F.3rd, 540 2001, WL 22918 (4th Cir., 2001). Smith is an unpublished case; however, the undersigned, like the Circuit panel, is persuaded by the reasoning of the lower Courts in Smith. It would appear that if a lien is wholly unsecured, a Chapter 7 Debtor should be able to strip it from his property pursuant to 11 U.S.C § 506.


That said, the procedural niceties must be met. Since such an effort involves a determination of dischargeability (a debt that is not discharged would not be subject to lien avoidance), and avoidance of a lien (determination of the extent, nature and validity of a lien), Bankruptcy Rule 7001 requires that this be

accomplished by adversary proceeding, not a motion. Thus, the Court cannot grant the Debtors relief as the matter stands.

Based upon the foregoing, the Debtors Motion is DENIED. However, anticipating that the Debtors will file a complaint, the Clerk is directed to keep the case file open for at least thirty (30) days to afford them an opportunity to do so.

SO ORDERED.

This the 24<sup>th</sup> day of April, 2001.

  
United States Bankruptcy Judge